UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA	)	
	)	Criminal No.: 3:00-CR-400-P
v.	)	
	)	Judge Jorge A. Solis
MARTIN NEWS AGENCY, INC.; and	)	
BENNETT T. MARTIN,	)	
	)	FILED: April 30, 2001
Defendants.	)	

RESPONSE AND BRIEF OF THE UNITED STATES IN OPPOSITION
TO DEFENDANTS' JOINT MOTION FOR BILL OF PARTICULARS

I
INTRODUCTION

Defendants have filed a *Joint Motion for Bill of Particulars* ("Motion") requesting the Court to order the United States to "allege and prove, through the filing of a Bill of Particulars, an overt act" by the defendants or co-conspirators during the relevant period covered by the statute of limitations. Motion, p. 5. Defendants want the identification of not only an overt act, unnecessary in a Sherman Act prosecution, but one within the applicable five year statute of limitations period. Further, they seem to want the United States to prove these overt acts in some sort of mini-trial, something that is clearly beyond the scope of a Bill of Particulars.

The United States opposes this Motion. Defendants have completely failed to even cite, let alone meet, the case law criteria for a Bill of Particulars. Moreover, their request asks for information beyond the scope of a Bill of Particulars and beyond the scope of what is necessary to sustain a Sherman Act conviction. Consequently, the Court should deny defendants' Motion.

II
A BILL OF PARTICULARS IS NOT NECESSARY ABSENT ACTUAL SURPRISE AND SUBSTANTIAL PREJUDICE

A. A BILL OF PARTICULARS IS NOT A DISCOVERY TOOL

The proper purpose of a Bill of Particulars is: (1) to inform the defendant of the charges against him with sufficient precision to avoid or at least minimize surprise at trial; (2) to enable adequate defense preparation; and (3) to allow a double jeopardy defense to be pled in case of a subsequent prosecution. United States v. Mackey, 551 F.2d 967, 970 (5th Cir. 1977); United States v. Sherriff, 546 F.2d 604, 606 (5th Cir. 1977). It is well established that a Bill of Particulars is not a discovery tool. United States v. Davis, 582 F.2d 947, 951 (5th Cir. 1978). Nor is it a "means of compelling disclosure of every detail of the preparation and theory of the Government's case." United States v. Tedesco, 441 F. Supp. 1336, 1343 (M.D. Pa. 1977). Finally, it is not a tool to ferret out the government's evidence in advance of trial. "The purpose [of a Bill] is not to provide detailed disclosure before trial of the Government's evidence." United States v. Sherriff, 546 F.2d 604, 606 (5th Cir. 1977). As one district court stated:

> The government should be required to provide, however, only information necessary for the defendant to investigate the allegations against him and adequately prepare a defense. If the indictment contains sufficient information, the Government should not be forced to produce evidentiary matters that will hamper their presentation of evidence at trial.

United States v. NL Indus., Inc., No. Civ. A. 89-346, 1989 WL 149210 (E.D. La. Nov. 30, 1989)(see attached).

In considering whether a Bill is appropriate, courts first consider the information contained in the Indictment itself. United States v. MMR Corp. (LA), supra, 1989 WL 6009 (E.D. La. Jan.

24, 1989)(see attached). The Court also must examine all of the information that the government has already made available to the defendants or has promised to provide them through other channels. MMR Corp. (LA), supra, 1989 WL 6009; United States v. NL Indus., Inc., supra, 1989 WL 149210. The decision to grant or deny a Bill of Particulars lies within the sound discretion of the Court. Wong Tai v. United States, 273 U.S. 77 (1927); United States v. Vesich, 726 F.2d 168, 169 (5th Cir. 1984); United States v. Montemayor, 703 F.2d 109, 117 (5th Cir. 1983), cert. denied, 464 U.S. 822 (1983). It will not be reversed on appeal absent a showing of surprise and substantial prejudice. United States v. Nixon, 816 F.2d 1022, 1031 (5th Cir. 1987).

B. DEFENDANTS HAVE ENOUGH INFORMATION TO ELIMINATE ANY SURPRISE AND PREJUDICE

The Indictment in this case sets forth the dates of the beginning and ending of the charged conspiracy. It describes the nature of the charged conspiracy, and describes the geographic area of the charged conspiracy. Indictment at 1-2, ¶¶1-3. It also sets forth a listing of ten acts that defendants and their co-conspirators did to carry out the conspiracy. Indictment at 2-3, ¶ 4. Defendants can investigate and prepare a defense from this information alone.

The government has also provided defendants with extensive discovery well in advance of trial. Pursuant to Rule 16(a)(1)(C), the government has produced to the defendants all of the documents in its possession from: (1) the three magazine wholesalers in the Dallas-Fort Worth area during the charged conspiracy period (i.e., Martin News, PMG/Trinity News, and C&S News); (2) certain retailers operating in the Dallas-Fort Worth area during the charged conspiracy period; and (3) materials gathered from other persons associated with magazine distribution in the Dallas-Fort Worth area during the charged conspiracy period. The government disclosed to

defendants all Brady/Giglio information in its possession. The government also has disclosed all statements to which the defendants are entitled under Federal Rule of Criminal Procedure 16(a)(1)(A), including grand jury transcripts and other statements of several individuals whom it expects to call at trial. In their grand jury testimony, these individuals discuss a number of competitive situations that provide defendants the specifics of the allegations in the Indictment.

As defendants are well aware, both of the other two magazine wholesalers in the Dallas-Fort Worth area pled guilty to allocating territories and customers in violation of Section 1 of the Sherman Act. The United States has provided copies of those plea agreements, together with the associated documents, including the factual résumé, of both of these pleas. In addition, several witnesses that the United States expects to call at trial have testified before the grand jury and their transcripts will be turned over in accordance with the The Jencks Act. Finally, here defendant Bennett T. Martin was intimately involved in the formation, implementation, and continuance of the charged conspiracy. Indeed, defendant Martin was the person who struck the collusive deal with his competitors. In United States v. Cole, 755 F.2d 748, 760 (11th Cir. 1985), the court held that a defendant could "hardly [be] surprised by the government's proof at trial" where the defendant himself participated in the illegal activities and such illegal acts were a significant part of the defendant's business. Under these circumstances, defendants simply cannot claim that they will suffer surprise and prejudice absent a Bill.

C. OVERT ACTS ARE UNNECESSARY IN A SHERMAN ACT CASE

Defendants have asked the Court to order the release of information completely outside of the scope of a proper Bill. Defendants request information on how the United States intends to prove that the conspiracy continued into the statute of limitations period. They have requested

that the United States be ordered to allege and prove what overt acts occurred within the statutory period, presumably with the goal of either moving this Court to dismiss the Indictment, making a similar argument to the jury, or making an affirmative showing of withdrawal from the conspiracy.

Defendants ignore case precedent establishing that there is no requirement that the government provide defendants with a list of overt acts establishing a conspiracy charge which it intends to prove at trial. United States v. Murray, 527 F.2d 401, 411 (5th Cir. 1976); United States v. Deerfield Specialty Papers, Inc., 501 F. Supp. 796, 810 (E.D. Pa. 1980). This is an especially improper request in the context of a Sherman Act charge. As defendants acknowledge, there is no requirement that any overt act be alleged or proven to sustain a Sherman Act conviction. Nash v. United States, 229 U.S. 373,378 (1913); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 225 n.59 (1940). The agreement itself is the crime. Id; United States v. Flom, 558 F.2d 1179, 1183 (5th Cir. 1977). Defendants confuse the issue by citing to many other forms of conspiracy crimes, some of which require overt acts to be alleged and proven and some that do not have such a requirement. The courts are unequivocal, and have been since the early 1900s, that no overt act is necessary to prove a Sherman Act violation. Hence the other statutes need not be addressed.

It is also well recognized that, once established, a conspiracy continues until the fruits of the conspiracy have been gained or the parties have abandoned their agreement. Hyde v. United States, 225 U.S. 347, 369 (1912); United States v. Knowles, 66 F.3d 1146, 1155 (11th Cir. 1995), cert. denied, 517 U.S. 1149 (1996). Indeed, "once a conspiracy has been established, it is presumed to continue until there is an affirmative showing that it has been abandoned." United

States v. Hayter Oil Co., 51 F.3d 1265, 1270-71 (6th Cir. 1995). In the Sherman Act context, an analysis of the time frame for a conspiracy's existence may turn not only on acts of the conspirators, but also on acts by innocent third parties. This Circuit has expressly ruled that not all acts in furtherance of a Sherman Act conspiracy need be illegal:

> Overt acts in furtherance of a conspiracy, however, need not be illegal. The acts listed here were performed for the purpose of forming or effectuating a conspiracy in restraint of trade and consequently constitute a violation of the antitrust laws.

United States v. Bi-Co Pavers, Inc. 741 F.2d 730 (5th Cir. 1984 (citation omitted)). Thus, courts have repeatedly held that the reimbursement by an innocent vendor on a rigged bid continues the conspiratorial period. United States v. Girard, 744 F.2d 1170, 1172-73 (5th Cir. 1984); United States v. Northern Improvement Co., 814 F.2d 540, 542 (8th Cir. 1987), cert. denied, 484 U.S. 846 (1987).

Continuation of a conspiracy also may be established by evidence that "relate[s] to something other than an overt act." United States v. Portsmouth Paving Corp., 694 F.2d 312, 324 (4th Cir. 1982). As the court in MMR Corp said:

> An indictment under the Sherman Act is not required to be detailed or evidentiary in nature, since the basis of a conspiracy charge is 'agreement rather than action, and the agreement is usually established by a course of dealing or pattern of conduct and the reasonable inferences to be drawn therefrom.'

MMR Corp., No. Crim. A. 88-559, 1989 WL 6009 at 3 (E. D. La. Jan. 24, 1989) (citing United States v. Fischbach and Moore, Inc., 576 F. Supp. 1384, 1388-1389 (W.D. Pa. 1983)).

Here, the United States will prove that, beginning at least as early as August 1990, defendants willingly and knowingly joined in an agreement to allocate customers and territories with their competitors and that this conspiracy continued at least until October 30, 1995, as

alleged in the Indictment. The United States will prove that the conspiracy continued into the statutory period[1] through an examination of the goals of the conspiracy, the behavior of the conspirators, and the actions of those who were victimized by the conspiracy. For purposes of the statute of limitations, it will prove that the conspiratorial agreement was continuing as of October 5, 1995, which is five years before the date of the Indictment. Nothing more is required.

D. THE GOVERNMENT SHOULD NOT HAVE TO PROVE ITS CASE BEFORE TRIAL

Defendants make the request that the United States be required to allege and prove the overt acts through a Bill of Particulars. The United States opposes any requirement that the United States offer proof before the July 9th trial of this matter. Defendants have cited no precedent for requiring the government to prove any aspect of its case in advance of trial. A Bill of Particulars is only meant as an informational forum designed to avoid surprise at trial, not as the launching pad for a mini-trial. The Court should deny defendants' Motion in its entirety.

E. A BILL SHOULD NOT BE GRANTED SO THAT DEFENDANTS CAN PERFECT THEIR AFFIRMATIVE DEFENSES

Of course, the length of a conspiracy may be impacted by a claim of withdrawal. In their Motion, defendants attempt to bolster their request by stating that courts have looked at behavior inconsistent with a collusive agreement to see whether a withdrawal has occurred. Motion, p. 5. This sets no new legal precedent. The burden of establishing withdrawal rests squarely on the defendants' shoulders. Withdrawal is an affirmative showing that a conspirator "took affirmative acts that were inconsistent with the object of the conspiracy, and communicated in a manner reasonably calculated to reach the other conspirators." United States v. Caicedo, 103 F.3d 410,

[1]The Indictment was returned on October 5, 2000, thereby making it necessary to show that the conspiracy continued until October 5, 1995, for it to be within the statutory period.

412 (5th Cir. 1997). In an analogous situation, the Supreme Court has concluded that the government need only provide Rule 16 discovery to rebut its case in chief and need not provide discovery to assist defendants in making an affirmative defense. United States v. Armstrong, 517 U.S. 456, 462 (1996). If discovery need not be provided in the Rule 16 context, then a Bill of Particulars, which is not a discovery device, should not be used as a vehicle to make an end run around Rule 16. Proof of an affirmative defense (like withdrawal) does not rest with the United States, nor with any information it might provide in a Bill of Particulars. As such, it forms no basis for ordering a Bill.

III
CONCLUSION

Defendants' request goes far beyond what is necessary to enable them to avoid surprise and prejudice at trial. It requests the specification of overt acts that are unnecessary in a Sherman

Act context. It asks the Court to turn a request for information into a mini-trial designed to allow defendants to make an affirmative defense of withdrawal or possibly a motion to dismiss. The Court should deny defendants' Motion.

Respectfully Submitted,

"/s/"

SCOTT M. WATSON
Chief, Cleveland Field Office

RICHARD T. HAMILTON, JR.
Ohio Bar Number--0042399

MICHAEL F. WOOD
District of Columbia Bar Number--376312

KIMBERLY A. SMITH
Ohio Bar Number--0069513

SARAH L. WAGNER
Texas Bar Number--24013700

Attorneys, Antitrust Division
U.S. Department of Justice
Plaza 9 Building, Suite 700
55 Erieview Plaza
Cleveland, OH 44114-1816
Telephone: (216) 522-4107
FAX: (216) 522-8332

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was sent via Federal Express to the Office of the Clerk of Court on this 27th day of April, 2001. In addition, copies of the above-captioned pleading were served upon the defendants via Federal Express on this 27th day of April 2001.

Richard Alan Anderson, Esq.
Burleson, Pate & Gibson, L.L.P.
2414 N. Akard, Suite 700
Dallas, TX 75201

Michael P. Gibson
Burleson, Pate & Gibson, L.L.P.
2414 N. Akard, Suite 700
Dallas, TX 75201

"/s/"
RICHARD T. HAMILTON, JR.